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ASSOCIATION OF
AMERICAN RAILROADS

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May 12, 2008

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E St., S W.
Washington, DC 20423

Re: STB Ex Parte No 676, Rail Transportation Contracts under 49 U S.C. 10709

Dear Acting Secretary Quinlan:

Pursuant to the Decision served by the Board on March 12, 2008 in the above proceeding, attached please find the Comments of the Association of American Railroads.

Respectfully submitted,

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Dated May 12, 2008

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COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") hereby submits comments in connection with the Surface Transportation Board's ("STB" or "Board") decision served March 12, 2008 in the above proceeding. Its members have in place a variety of contractual arrangements with their customers, and thus the AAR has an interest in this proceeding.

I. Introduction

In its Notice served March 12, 2008, the Board instituted this rulemaking proceeding to consider imposing a requirement that a carrier provide "a full disclosure statement" when it seeks to enter into a rail transportation contract under the provisions of 49 U.S.C. 10709.[1] The proposed statement would "explicitly" advise the shipper that: (1) "the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board;" and (2) the shipper "has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before

[1] The Board's proposal applies only to contracts under 49 U.S.C 10709 for the movement of otherwise regulated commodities Accordingly, AAR's comments are confined to contracts under 49 U S C. 10709 and are not directed at transportation arrangements that are otherwise exempt pursuant to 49 U S C 10502 (or former 49 U S C 10505)

the Board." The Board would also require that "before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options " The Notice seeks suggestions from parties as to what language should be included in the "full disclosure/informed consent" requirement. Notice at 4.

Any requirements such as those proposed in this proceeding, where specified procedural requirements are a condition to entering into contracts under 49 U S.C 10709, are beyond the Board's statutory authority. Moreover, the imposition of the proposed requirements is unnecessary and would be counterproductive as discussed below.

While the Board does not have statutory authority to impose the "full disclosure/informed consent" requirements as set forth in its Notice, the Board could minimize disputes concerning the Board's jurisdiction over commercial arrangements that are contracts under 49 U S C 10709 by clarifying circumstances where a contract exists and, as a result, where the Board has no jurisdiction over a rate challenge. The Board could issue a statement that there is an unrebuttable presumption that a contract exists in circumstances where either: (1) a railroad provided the shipper with an explicit statement that the railroad intended to enter into a contract, (2) the contract contains an explicit reference to section 10709, or (3) a shipper explicitly acknowledged that it was entering into an arrangement that is not subject to Board jurisdiction. Consistent with existing precedent, other evidence might also establish the Board's lack of jurisdiction over a rate challenge based on the existence of a contract, but satisfaction of any of the above three conditions would automatically require dismissal of a rate complaint before the Board.

II. Background of Proceeding

The Board's proposal is an outgrowth of the Board's contemporaneous March 12, 2008 decision terminating its rulemaking in Ex Parte No. 669, Interpretation of the Term "Contract" in 49 U.S.C.10709. In the XP 669 proceeding, the Board proposed to define a contract under Section 10709 as "any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper...." XP 669 Notice of Proposed Rulemaking at 6 (served March 29, 2007).

Numerous parties (both carriers and shippers) questioned the Board's jurisdiction to act with respect to contracts and pointed out various bilateral and unilateral transportation arrangements employed by carriers and shippers that would render the Board's proposed definition both over- and under-inclusive Numerous parties also pointed out that the question whether a particular rate is a contract or common carrier rate turns on the intent of the parties, and the Board's proposed rule ignored the critical element of the parties' contractual intent. In response to these comments, the Board terminated the rulemaking. As the Board concluded, "the proposed rule would not adequately resolve the concerns that motivated the proposal, and could well result in unintended consequences that are best avoided." Notice at 4.

The instant proceeding was initiated by the Board to address the concerns in XP 669 "by other means." Notice at 4. The Board noted that it "remained concerned with the lack of any clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board's jurisdiction " The "other

means" proposed by the Board in this rulemaking is that a carrier provide the "full disclosure/informed consent" statement described in the Notice when it seeks to enter into a rail transportation contract under the provisions of 49 U.S.C. 10709.

III. Argument

A. The Board Does Not Have the Statutory Authority to Impose the "Full Disclosure/Informed Consent" Requirement as a Regulatory Precondition to Entering into a Rail Transportation Contract under 49 U.S.C. 10709

The statute and court decisions make clear the STB has no jurisdiction over contracts and no authority to examine or impose requirements in contracts. The Board's current proposal would improperly thrust the Board into the court's arena of establishing the criteria and examining the facts and circumstances to determine when a contract exists and when one does not.

1. Under 49 U.S.C. 10709, the Board Has No Jurisdiction over Contract Matters, Including the Contract Formation Process

a. The Purpose of 49 U.S.C.10709 Is to Preclude Exercise of Board Jurisdiction over Contracts

Rail transportation contracts under the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104-88, 109 Stat. 803 (1995)) are governed by the provisions of 49 U.S.C. 10709. Pursuant to 49 U.S.C. 10709 (a), a rail carrier has broad authority to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." Section 10709 further provides that "a contract...authorized by this section, and transportation under such contract" shall not be subject to the regulatory jurisdiction of the Board and that the "exclusive remedy for any alleged breach of a contract... shall be an action" in an appropriate state or federal district court. 49 U S.C. 10709 (b) and (c)

The contract provisions of the ICCTA originated in the Staggers Rail Act of 1980 (Pub. L. 96-448, 94 Stat. 1895 (1980)) and were "among the most important" provisions of the Staggers Act's deregulatory reforms. *See*, S. Rep. No. 96-470, 96th Cong , 1st Sess. (Dec. 7, 1979) at 9 (Senate Report). In specifically providing for rail transportation contracts in the Staggers Act, Congress intended to free the railroads and their customers from regulatory constraints pertaining to rate and service offerings and to encourage the railroads to compete freely in the marketplace using commercially recognized contractual arrangements. H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. (May 16, 1980) at 58 (House Report) ("The Committee believes that contracts shall be treated as they are elsewhere in the economy").

In enacting the ICCTA, Congress expressly affirmed the success of the rail transportation contract provisions of the Staggers Act in permitting railroads the opportunity to market their transportation services free from regulatory constraints *See* H. R. Rep. No. 104-311, 104th Cong., 1st Sess. (Nov. 6, 1995) at 99 (ICCTA House Report) (referencing the "Staggers Act's very successful encouragement" of contracts). Congress in the ICCTA also specifically reinforced the railroads' marketing freedom under the contract provisions by eliminating all vestiges of regulatory requirements pertaining to rail transportation contracts for non-agricultural commodities (*see* House Conference Report No. 104-22 , 104th Cong., 1st Sess (Dec 18, 1995) at 174-175 (ICCTA Conference Report)) and by streamlining provisions applicable to third-party challenges to rail transportation contracts for agricultural commodities on the limited statutory grounds provided. ICCTA Conference Report at 174-175; *see* 49 U.S.C. 10709 (d)-(g).[2]

[2] A rail contract for the transportation of agricultural products (including grain) can only be challenged before the Board in an initial 30-60 day period on limited grounds A contract (for which a summary must

Accordingly, under 49 U S.C. 10709, the manner in which a rail carrier may enter into such a contract under 49 U.S C.10709, the form of the contract, and the scope and terms of the contract itself are left to the discretion of the carrier and its customers as market conditions warrant. Under the statute, only courts may determine what is required to form a valid contract, whether a contract exists, and what the terms of the contract are.[3]

b. The Board's Lack of Jurisdiction over 49 U.S.C. 10709 Contract Issues is Expressly Recognized by the Courts and the Board

The courts have consistently rejected efforts to assert any form of ICC or STB jurisdiction over authorized contracts. *See* Cleveland Cliffs Iron Co. v I C.C., 664 F.2d 568, 591 (6th Cir. 1981) (ICC has no authority "to entertain and decide questions concerning the existence and validity of contracts [under] the common law of contracts", this is "a purely judicial task, and we are unable to find support in the Staggers Rail Act or prior law for it"); *accord* Hanna Mining Co v Escanaba & Lake Superior R.R Co., 664 F. 2d 594, 600 (6th Cir. 1981) ("question of the legality and existence of such contracts" are matters for the courts not the agency); Burlington N. R R. Co v I.C.C., 679 F.2d 934, 937 (D.C Cir. 1982) ("the paramount design of Congress to reduce the ICC's regulatory role, and the clear legislative intent to place contract disputes in court, must direct the Commission's course"); Kansas Power & Light Co. v Burlington N.R R.Co ,

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be filed pursuant to 49 U S C 10709 (d)) can only be challenged by a third-party shipper demonstrating that the shipper individually will be harmed because the contract (1) would unduly impair the ability of the contracting carriers to meet their common carrier obligation to the complainant under 49 U S C 11101 or additionally (2) for an agricultural commodities shipper, that the contract would individually harm the complainant because it unreasonably discriminates against the shipper or constitutes a destructive competitive practice (49 U S.C. 10709 (g)(2)(A)(i) and (g)(2)(B)(i)-(ii)), a contract for the transportation of agricultural commodities may also be challenged by a port alleging that it will be individually harmed because the proposed contract unreasonably discriminates against it (49 U S C 10709 (g)(2) (A)(ii)) The Board, by news release issued April 28, 2008, has recently instituted the practice of posting contract summaries for the transportation of agricultural products filed with the Board on its website.

[3] Subject to the limited exceptions for agricultural contracts as set forth in footnote 2 above

740 F. 2d 780, 785 (10th Cir. 1984) ("the courts, not the ICC, ...is the appropriate forum for determining the existence of an enforceable contract").

Predicated on the clear language of 49 U S.C 10709 and the applicable case law, the Board itself expressly recognized its lack of jurisdiction over contract matters under 49 U.S.C. 10709: "Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board's jurisdiction." (Notice at 1); *see also* Rates on Iron Ore, Randville to Escanaba via Iron Mountain, 367 I C.C 506, 510 (1983) ("to entertain and decide questions concerning the existence and validity of contracts.. is a purely judicial task which is not to be performed by the Commission").

The Board also recognized that "there is no clear distinction in the statute . between a contract and a common carrier rate" and that under agency precedent, "[t]he issue of whether a rate is a contract or common carrier rate has been examined on a case-by-case basis in light of the parties' intent." *See* Notice at 1 (referencing Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV, 364 I.C.C. 678, 689 (1981)); accord Union Pacific Railroad Company—Petition for Declaratory Order, STB Docket No. 35021, at 2-3 (STB served May 16, 2007); *see also* Kansas Power & Light Co., 740 F 2d at 785 ("[T] he controlling question as to whether a binding agreement was entered into is the matter of intent of the parties"). As the case law also emphasizes, determination of contractual intent is a matter expressly relegated to the courts and is a function for which the courts are well-suited. *See* Cleveland Cliffs, 664 F. 2d at 592; Burlington N. R.R. Co., 679 F2d at 942.

Moreover, even in those cases where the Board has asserted that it has "primary authority to determine its own jurisdiction" where a 49 U.S.C.10709 contract claim arose

in the context of a pending rate reasonableness proceeding (*see* Union Pacific Railroad Company—Petition for Declaratory Order, STB Docket No. 35021, at 3 (served May 16, 2007)[4], the Board recognized that its only role was to determine whether such contract claim defense is "frivolous" in the context of the proceeding. *See* Toledo Edison Co. v Norfolk & Western Ry. Co., 367 I.C.C. 869, 871-872 (1983). Thus, where a party makes a "minimal evidentiary showing" that there is a "reasonable possibility" that a contract exists, the Board is compelled to dismiss the proceeding. *See* ICC Docket No. 39060, Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501 (ICC served March 2, 1983) at 4 ("We caution all litigants in administrative rate proceedings ..that the potential jurisdictional issue of an alleged rate contract must be raised in some minimal evidentiary fashion to require the agency to defer to the courts under Cleveland Cliffs and Burlington Northern"); *accord* Cross Oil Refining & Mktg., Inc. v Union Pacific R. R Co, STB Docket No. 33582 , at 2-3 (served Oct. 27, 1998) ("Cross Oil") (dismissing the case and specifically noting that document at issue was clear on face that it constituted a contract where the document had a notation "This CONTRACT is made pursuant to 49 U.S.C. 10709" (emphasis in original)).

2. The Board's Proposals Would Improperly Attempt to Impose Regulatory Preconditions for Entering into Contracts Subject to the Provisions of 49 U.S.C. 10709 and Improperly Require Carriers to Follow Specified Regulatory Requirements in the Formation of Contracts

a. The "Full Disclosure" Statement Requirement is Beyond the Board's Jurisdiction and Unnecessary

In its Notice, the Board proposes that a carrier be required to provide a "full disclosure" statement when it seeks to enter into a rail transportation contract under

[4] In asserting such authority the Board makes general reference to Burlington N , Inc. v Chicago & N.W. Transp Co , 649 F 2d 556, 558 (8th Cir 1981)

section 10709. The statement "would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board." The "full disclosure" statement would also require the carrier "to advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before the Board."

As explained above, it is beyond the Board's jurisdiction to impose a requirement that the carrier must "read the shipper its rights" under ICCTA before the carrier can enter into a 10709 contract. This requirement is inconsistent with the provisions of section 10709. Congress sought to encourage the use of contracts under section 10709, not to impose obstacles on parties seeking to enter into contracts.

In addition, it should not be assumed, as implied in the Notice, that shippers do not understand the implications of a contractual relationship. Shippers are engaged in business operations and they make or reject contracts all the time. And when they do enter into a contractual relationship, they are well aware that the obligations of the parties are established by the terms of the contract.

Similarly, it cannot be assumed that shippers are unaware that they can request a common carriage rate if they do not choose to accept a carrier's contractual offer. The record in the discontinued XP 669 proceeding is replete with shipper acknowledgements that they have a right to request a common carriage rate in the absence of a contract rate for regulated commodities. *See, e g*, Reply Comments of National Grain and Feed Association (NGFA) at 6 (specifically referencing requirements of 49 U.S.C. 11101, Reply Comments of National Industrial Transportation League, at 9, n 9 (referencing

requirements of 49 U.S.C. 11101); Opening Comments of Western Coal Traffic League, at 3, 8, 24-25 (referencing requirements of 49 U.S.C. 11101).

b. The "Informed Consent" Statement is Beyond the Board's Jurisdiction and is Both Unnecessary and Counterproductive

The Board's proposal would also require that "before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options." Notice at 4. As was the case with the disclosure requirements above, the Board also does not have the statutory authority under section 10709 to impose such an "informed consent" requirement as a precondition to entering into a contract

Moreover, the proposed "informed consent" statement requirement interjects the Board directly into the contract formation and negotiation process by interposing a written waiver requirement into the process. Such requirement is contrary to the statutory scheme of section 10709, which is directed at keeping the Board out of the contract negotiation and formation process entirely.

Further, the "informed consent' requirement is not only unnecessary to inform shippers of their rights and obligations under a contract entered into pursuant to section 10709 for the reasons discussed above, but also has the potential to complicate the contract process and make it more difficult for carriers and shippers alike. First, the proposal would potentially delay the timely implementation of contracts where an expedited timeframe is essential for one or both parties. This delay would result because the proposal injects an additional step in the contract negotiation and formation process. This would occur where a shipper is attempting to take prompt advantage of an

advantageous price for its product. It would also occur where the carrier is trying to timely meet a competitive offer by a trucking firm or other carrier competitor. The "informed consent" proposal, in the context of a specific contract negotiation, could also give rise to issues as to the scope of the waiver, and require an additional round of negotiation should a shipper attempt to "pick and choose" specific proposed contractual provisions for which it wishes to retain regulatory options. The railroads' trucking and barge competitors do not have to deal with an "informed consent" requirement in negotiating contracts and neither should rail carriers pursuant to the statutory language and intent of the contract provisions.[5]

Lastly, the Board's proposal has the potential to create uncertainty in the contract process. While the Board's proposal requires the carrier to provide the shipper an "opportunity" to sign an "informed consent" statement before entering into a contract, the proposal does not require that the shipper sign it before a contract is entered into. If the shipper subsequently signs the contract (but not an "informed consent" statement) and the carrier accepts the shipper's action as full assent, there is no certainty how the Board would view the situation.

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[5] The proposed requirement that a shipper sign an "informed consent" before entering into a contract is also inconsistent with contract law and modern technology. For example, signatureless contracts are contracts under the law *See, e g*, Specht v Netscape Communications Corp., 306 F 3d 17, 29-30 (2d Cir 2002) ("Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract"), AGA Shareholders, LLC v CSK Auto, Inc., 467 F Supp 2d 834, 845-846 (N D Ill. 2006) (signature not necessary to show mutuality or assent, "these facts may be shown in other ways as, for example, by acts or conduct of the parties"), *see generally*, Restatement (Second) of Contracts, § 19 (2) (1981) (conduct of party can be effective as manifestation of assent) Modern technology facilitates parties' use of signatureless contracts, which themselves make it easier to conduct business in a timely fashion The Board's proposal would impair the railroads ability to use these business tools.

B. The Board Can Clarify Circumstances Where a Contract Exists to Minimize Disputes Concerning the Board's Jurisdiction.

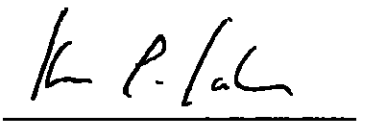
As noted above, the Board does not have the statutory authority to set procedural preconditions for a contract to exist. However, the Board could clarify that in circumstances where a railroad has made a disclosure of its intent to enter into a contract or where a shipper has provided an express acknowledgment that it is entering into a contract, the Board would clearly have no jurisdiction over a rate challenge. Such a clarifying statement would ensure that the parties would not waste time litigating before the STB over arrangements that are clearly not subject to the Board's jurisdiction. As noted above, the Board could issue a statement that there is an unrebuttable presumption that a contract exists in circumstances where either: (1) a railroad provided the shipper with an explicit statement that the railroad intended to enter into a contract, (2) the contract contains an explicit reference to section 10709, or (3) a shipper explicitly acknowledged that it was entering into an arrangement that is not subject to Board jurisdiction. Consistent with existing precedent, other evidence might also establish the Board's lack of jurisdiction over a rate challenge based on the existence of a contract, but satisfaction of any of these three conditions would automatically satisfy the "reasonable possibility" standard as described above in ICC Docket No. 39060, Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501 (ICC served March 2, 1983) thereby compelling dismissal of the proceeding before the Board. This approach would be clearly consistent with the requirements of 49 U.S.C. 10709 and the courts' and the Board's prior holdings that the Board has no jurisdiction over contracts.

Conclusion

The proposed contract disclosure/informed consent requirement in the Notice is a step backward from the Staggers Act and ICCTA deregulatory reforms pertaining to rail transportation contracts. It was Congress' clear intent, in enacting 49 U.S C.10709 (and former 49 U.S.C. 10713), that the Board encourage the use of rail transportation contracts, including customized arrangements, to the maximum extent possible and not attempt to impede the process in any manner. Instead, the proposal in the Notice appears to be encouraging a more adversarial relationship between carriers and shippers in the contract process (1) through a "read them their rights" regulatory approach, and (2) by seeking to impose extra-statutory and unnecessary requirements that would serve mainly to complicate and delay contract agreements.

The Board should discontinue this proceeding because its proposals are beyond its statutory authority and counterproductive. Alternatively, to minimize potential disputes over the Board's jurisdiction, the Board could clarify that in circumstances where a railroad has made a full disclosure of its intent to enter into a contract or where a shipper has provided an express acknowledgment that it is entering into a contract, the Board will conclude that there is an unrebuttable presumption of a contract. This would not preclude the presentation of other evidence of the existence of a contract thereby allowing the Board, carriers, and shippers maximum flexibility to tailor contractual arrangements consistent with the intent of section 10709. Lastly, any Board statement should apply only prospectively and not be applicable to existing contracts or amendments or supplements to existing contracts.

Respectfully submitted,



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